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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RYAN CHRISTOPHER WHEATLEY, Defendant and Appellant.	E054975 (Super.Ct.No. FSB903235) OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Affirmed as modified with directions.

Lynelle K. Hee, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and James D. Dutton and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

While driving with a blood alcohol level of approximately 0.15, defendant Ryan Christopher Wheatley swerved right onto the shoulder, hitting a stand pipe, then swerved left into the oncoming lane, hitting another vehicle and killing the driver.

After a jury trial, defendant was found guilty of second degree murder (Pen. Code, § 187, subd. (a)) and gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a).) He was sentenced to a total of 15 years to life in prison, along with the usual fines and fees.

Defendant now contends:

1. The trial court erred by excluding evidence that the shoulder was considered a "clear recovery zone" that should be kept clear of pipes and similar obstructions.

2. The trial court erred by admitting defendant's statements at the time of a previous arrest because they constituted improper character evidence.

3. The prosecutor committed misconduct by misstating the law and misstating facts in closing argument.

4. The trial court erred by (a) declaring the vehicle that defendant was driving a nuisance and ordering it sold, (b) designating defendant a habitual traffic offender, and (c) prohibiting defendant from obtaining a restricted license unless he installed an ignition interlock device.

We agree that the challenged sentencing provisions are inapplicable and must be deleted. Otherwise, we find no error.

I

FACTUAL BACKGROUND

A. *The Fatal Accident*.

On August 2, 2009, around 2:30 p.m., defendant was driving a Ford F-150 pickup truck north on Orange Street between Redlands and Highland. He made hand gestures to a nearby car indicating that he wanted to race. He started alternately braking, then revving his engine and speeding up again. Meanwhile, he was swerving — repeatedly drifting to the right, then correcting himself.

Defendant drifted to the right one last time, so that his two right-side tires were on the dirt shoulder. The truck hit a water stand pipe, about three feet tall, which was located in the shoulder. The truck continued to go relatively straight for nearly 250 feet. It then "jerked" or "overcorrected" to the left, going back onto the roadway and over the double yellow line, into oncoming traffic. It collided with a Nissan Sentra driven by Sara Cisneros. She died at the scene.

Onlookers saw defendant jump into the back seat of the truck.

B. *The Police Investigation*.

When police officers arrived, two or three minutes later, they found defendant sitting in the rear seat on the passenger side. Brandon Sisson, the owner of the truck, was sitting in the front passenger seat.

Defendant told the police that a man named "Brad" had been driving, and after the collision, Brad ran away. Sisson, however, pointed to defendant, which the police took to mean that defendant had been driving.

In or near the truck, there were two vodka bottles, several Powerade bottles, and a cranberry drink bottle. Defendant's eyes were watery and bloodshot. Samples of defendant's blood taken at 4:02, 4:40, and 5:01 p.m. showed blood alcohol levels of 0.15, 0.15, and 0.11, respectively.

Defendant's blood also tested positive for hydrocodone, at a level of 31 nanograms per milliliter; a "therapeutic" level would be 2 to 24 nanograms per milliliter.[1] In defendant's home, the police found a bottle of prescription hydrocodone.

A sample of Sisson's blood, taken at 4:25 p.m., had a blood alcohol level of 0.28.

Before the accident, the truck had been in good working order. After the accident, the left front tire and the right rear tire were both flat. The right rear tire had a slice-shaped puncture in the sidewall. According to an officer with training and experience in postaccident mechanical inspections, the left front tire went flat as a result of the collision. The right rear tire went flat because the forces to which it was subjected tore it away from the rim; the puncture then occurred because the tire was caught between the rim and the roadway.

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[1] A cocaine metabolite was also found in defendant's blood, which meant that he had used cocaine one to three days earlier but was not under the influence.

C. *Defendant's Alcohol Consumption*.

Before the accident, around 1:00 p.m., defendant and Sisson went to the Rotten Oak, a bar in Highland. Sisson drove them there in his truck. On the way, defendant mixed together some vodka, cranberry juice, and Powerade. When they got to the Rotten Oak, they brought in the mixture in Powerade bottles and drank it. They also ordered and drank a pitcher of beer.

When they left, defendant drove the truck because Sisson had had too much to drink. Sisson fell asleep until he was awakened by the accident.

D. *Defendant's Prior Convictions*.

On July 21, 2004, defendant suffered his first drunk-driving-related conviction. He pleaded guilty. He was placed on probation and ordered to complete a program for first offenders. He took and completed a program offered by the Jackson-Bibby Awareness Group. It included education on the possibility that drinking and driving could result in "[p]eople getting killed[.]"

On May 11, 2007, defendant suffered his second drunk-driving-related conviction. Again, he pleaded guilty. The plea form included a warning that, if he continued to drive under the influence of alcohol or drugs, and if, as a result, someone was killed, he could be charged with murder.

On May 18, 2007, defendant suffered his third drunk-driving-related conviction. Once again, he pleaded guilty, and once again, the plea form included a warning about his potential exposure to a murder charge.

On July 16 and August 20, 2007, defendant attended programs sponsored by Mothers Against Drunk Driving (MADD). Both programs included warnings about his potential exposure to a murder charge.

When the accident occurred, defendant was still on probation, and his license was revoked or suspended.

E. *Defendant's Testimony*.

According to defendant, he poured the Powerade into two bottles, one for Sisson and one for himself. Defendant's bottle did not have any vodka. However, he did "tr[y]" Sisson's drink "a couple [of] times."

After leaving the Rotten Oak, defendant insisted on driving, because Sisson was practically passing out, whereas defendant did not feel impaired.

The gestures that another driver took as a challenge to race actually meant that the other driver should go in front of defendant, because the road was about to narrow from two lanes down to one.

As the truck went over a dip, it made a loud noise and started pulling to the right. Defendant assumed that a tire had blown out.[2] As he started to pull over onto the shoulder, the truck hit the pipe. After that, defendant lost control.

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[2] One eyewitness remembered hearing a "loud noise" before the truck swerved onto the shoulder. She described it as "like hitting metal, like if he hit . . . side rails . . . ."

After the accident, defendant got into the back seat because the air bag was in his way. He admitted lying to the police about "Brad" because he was "scared," though he claimed he did not think he had done anything wrong.

On the day of the accident, however, when defendant was first interviewed, he said he swerved to the right because he was startled by another car that sped by him. He did not say that he heard a loud noise or had a blowout.

In a second interview later that day, defendant said he swerved "for no known reason." Once again, he did not say that he heard a loud noise or had a blowout.

In a third interview that same day, defendant said the truck went to the right because he was looking at Sisson and talking to him. He specifically denied having a blowout.

F. *Expert Testimony for the Defense*.

Karl Blaufuss, a civil engineer with some experience in accident reconstruction, testified as an expert for the defense.

Blaufuss believed, based on the puncture, and based on the fact that one witness heard a loud noise, that the right rear tire blew out. This would have caused the truck to drift to the right.

After the truck hit the pipe, it rotated clockwise and started skidding sideways. The brakes would have been ineffective. Defendant then overcorrected, steering all the way to left, to avoid the embankment.

In Blaufuss's opinion, once defendant overcorrected, there was a 95 percent chance that the accident would have occurred, no matter who was driving.

II

EVIDENCE THAT THE PIPE WAS IMPROPERLY PLACED

IN A "CLEAR RECOVERY ZONE"

Defendant contends that the trial court erred by excluding evidence that the shoulder was considered a "clear recovery zone."

A. *Additional Factual and Procedural Background.*

The prosecutor filed a motion in limine to exclude (among other things) Blaufuss's opinion that the pipe was improperly placed in a "clear recovery zone," as well as the portions of a Caltrans highway design manual on which that opinion was based. He argued that the evidence showed, at most, that third party negligence was a concurrent cause of the accident, not a superseding cause.

Defense counsel filed a written response. In it, he made the following offer of proof: "[The] CalTrans Highway Design Manual sets forth construction standards including, but not limited to a 'Clear Recovery Zone' . . . . The expert will testify this zone extends into the area of the roadway where the referenced pipe was improperly located. Specifically, that fixed objects, like the pipe in question, should be removed [from] the recovery zone. This zone is specifically provided . . . to allow the drivers of errant vehicles the opportunity to regain control."

Defense counsel argued that this evidence was relevant to foreseeability and causation.

After hearing argument, the trial court ruled that the evidence was irrelevant unless there was evidence that defendant expected there to be a clear recovery zone and performed some "volitional acts" in reliance on this expectation. It indicated that the evidence would be admissible if there was evidence that defendant "was acting volitionally . . . and . . . because of some reasonable assumption that he had he acted a particular way." It also indicated that the Caltrans manual was irrelevant in the absence of evidence that defendant (or the "average driver") was familiar with the contents of the manual. Thus, it precluded any reference to a clear recovery zone or to the highway design manual unless and until it held a hearing pursuant to Evidence Code section 402.

Before Blaufuss testified, the trial court raised the issue again. It observed, "[I]n terms of road design issues, . . . in terms of the standards that should be used, whether there was any type of defect in the way it was designed . . . I haven't found any evidence that would indicate . . . that he should be allowed to get into that."

Defense counsel argued, "[I]t goes to causation."

The prosecutor replied, " . . . I don't think any circumstances have changed . . . ."

The trial court then excluded the evidence as irrelevant: "[I]n a criminal case such as this the only question . . . is whether or not the actions of the defendant were a substantial factor in causing the death of the individual. . . . [¶] . . . [¶] It's not a question of whether or not somebody was negligent for putting the pipe there."

B. *Analysis.*

"'In general, an "independent" intervening cause will absolve a defendant of criminal liability. [Citation.] However, in order to be "independent" the intervening cause must be "unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause." [Citation.] On the other hand, a "dependent" intervening cause will not relieve the defendant of criminal liability. "A defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is 'dependent' and not a superseding cause, and will not relieve defendant of liability. [Citation.] '[ ] The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. [ ] The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act.' [Citation.]" [Citation.]' [Citations.]" (*People v. Cervantes* (2001) 26 Cal.4th 860, 871.)

Defendant's offer of proof was to the effect that the placement of the pipe was negligent. However, defendant never offered to prove that it was not reasonably foreseeable that a pipe or some other obstruction might be negligently placed in the shoulder of the road. Indeed, he concedes that "[t]he existence of some obstructions, such as debris or something as large as a car, might be foreseeable."

Defendant argues that "it is reasonable to assume that the road conditions would comply with industry standards." However, as the trial court noted, there was no evidence that either defendant or the "average driver" was aware of such industry standards; in the absence of such evidence, there was no basis for any such assumption. In any event, this argument erroneously blurs the legal distinction between whether a third party is negligent and whether the third party's negligence is foreseeable. Basically, defendant is arguing that it is not reasonably foreseeable that anyone will ever be negligent. This is not the law. (E.g., *People v. Zarazua* (2008) 162 Cal.App.4th 1348, 1361-1362 [when someone shoots at an occupied vehicle, "[t]he victims' flight without regard for traffic laws is . . . predictable"]; *People v. Wattier* (1996) 51 Cal.App.4th 948, 952-954 [in prosecution for vehicular manslaughter, victim's failure to wear seatbelt is irrelevant].)

Defendant also argues that, even if the presence of some type of obstruction might be foreseeable, "the existence of an unmarked, working water pipe, just three feet above the ground, which, when struck, could cause the driver to lose control of the vehicle was not a foreseeable event." The issue, however, is not the foreseeability of the particular concurring cause, in all its glory, but rather the foreseeability of """"some harm of the kind which might result from [the defendant's] act."""" (*People v. Cervantes*, *supra*, 26 Cal.4th at p. 871.) The excluded evidence simply did not address this.

Defendant relies on *People v. Glass* (1968) 266 Cal.App.2d 222. In *People v. Autry* (1995) 37 Cal.App.4th 351, however, the court distinguished *Glass* on grounds that

are equally applicable in this case: "[In *Glass*, t]he defendant was convicted of vehicular manslaughter, after striking two members of a repair crew repaving a portion of a street. There was evidence that no flagman was present warning of the repair work, which considerably narrowed the street, no speed reduction signs were posted, and no barricades were erected to direct traffic around the work. The defendant offered to prove that the absence of these safety measures fell below the applicable standard of care, so as to make the street a dangerous condition. The appellate court held the evidence should have been admitted because it was relevant to two issues: (1) punishment, because under the statute then in effect the jury could recommend confinement in county jail rather than state prison [citation], and (2) to prove that the unsafe condition of the road was the sole cause of the accident. [Citation.] Neither of these issues is involved here. Appellant did not, and under the evidence could not, argue that the absence of an attenuator was the sole cause of the accident. Rather he contended, erroneously, that it was an intervening or superseding cause which relieved him of the consequences of his own conduct which caused the accident." (*Autry*, at pp. 361-362, italics omitted.)

Finally, "'[w]e . . . reject defendant's various claims that the trial court's exclusion of the proffered evidence violated his federal constitutional rights . . . . There was no error under state law, and we have long observed that, "[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [state or federal constitutional] right to present a defense."' [Citations.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1243.)

III

THE ADMISSION OF DEFENDANT'S STATEMENTS IN CONNECTION WITH A PRIOR ARREST

Defendant contends that the trial court erred by admitting his statements at the time of a previous arrest because they constituted improper character evidence.

A. *Additional Factual and Procedural Background.*

The prosecutor proposed to call police officers to testify about prior incidents in which they stopped defendant for driving under the influence and specifically about defendant's "erratic driving" and his "comments or attitudes." He argued that this evidence was relevant to defendant's "awareness" and "conscious disregard." Defense counsel objected to the evidence as improper character evidence and as more prejudicial than probative.

The trial court excluded evidence of how defendant was driving in the prior incidents, but it admitted his statements.

The prosecutor then called Officer Jeffrey Moran. Officer Moran testified that on February 7, 2007, at 11:36 a.m., he stopped defendant on the I-15 just outside the Nevada state line. Defendant said he was coming from Las Vegas; he explained that he had gone to Las Vegas to "party" after "finish[ing] rehab . . . for the third time . . . ." The night before, defendant said, he had had 15 to 20 White Russians at a strip club. On the way home, he had two more White Russians at Whiskey Pete's.

Officer Moran arrested defendant for driving under the influence. Defendant then commented that the car he was driving was new, adding that "he has 480 miles on that car and he was intoxicated for every one of them." He added that "he did a Jeff Gordon and kept on going." (Jeff Gordon is a NASCAR racer.)

B. *Analysis.*

"With certain exceptions not relevant here, Evidence Code section 1101, subdivision (a), provides that 'evidence of a person's character' — whether in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct — 'is inadmissible when offered to prove [the person's] conduct on a specified occasion.' This prohibition, however, does not preclude 'the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact . . . other than [the person's] disposition to commit such an act,' including 'motive, opportunity, intent, preparation, [or] plan.' (Evid. Code, § 1101, subd. (b).)" (*People v. Valdez* (2012) 55 Cal.4th 82, 129.)

"'To be admissible to show intent, "the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance." [Citations.]' [Citation.] Additionally, the probative value of the proffered evidence must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citation.]" (*People v. Jones* (2012) 54 Cal.4th 1, 50.)

To convict defendant of second degree murder, the prosecution had to show that (1) defendant knew that his conduct endangered the life of another, and (2) defendant acted with conscious disregard for life. (*People v. Watson* (1981) 30 Cal.3d 290, 300, disapproved on other grounds in *People v. Sanchez* (2001) 24 Cal.4th 983, 991, fn. 3.)

Defendant argues that the challenged evidence does not tend to show the necessary knowledge. We agree. Such knowledge was shown by the evidence that defendant had been taught about the dangers of drunk driving in prior driving-under-the-influence classes. Given that knowledge, however, the challenged evidence did tend to show that, in 2007, defendant acted with conscious disregard. Indeed, in the trial court, the prosecutor said he wanted to "focus" on the 2007 conviction because it "occurred after he took those DUI classes, after he was told about all this information."

Moreover, the 2007 offense was sufficiently similar to the charged offense to support the inference that defendant acted with conscious disregard again. In 2009, defendant still had at least as much knowledge of the risks of drunk driving as in 2007. In both instances, he consumed a prodigious amount of alcohol, so as to be drunk in the middle of the day. In both, he nevertheless decided to drive. It is fairly inferable that, once again, he was subjectively cavalier about the consequences — indeed, that he saw himself as doing "a Jeff Gordon."

Defendant argues that the prosecutor supposedly conceded that the evidence was character evidence. Actually, after the trial court commented, "[I]t appears to me you're seeking to introduce . . . character evidence . . . ," the prosecutor responded, "Well, I

would say that all this type of evidence is character evidence of some sort. *As long as there's some relevan*[*ce*] *beyond character evidence*[,] *that's admissible*." (Italics added.) In other words — just as we said above — evidence of past misconduct is admissible if it is relevant to some issue other than disposition or propensity even if otherwise it would be improper character evidence. This was a correct statement of the law, not a concession.

Defendant also argues that the evidence was more prejudicial than probative. "We apply the deferential abuse of discretion standard to a trial court's rulings under Evidence Code section 352. [Citations.]" (*People v. Pollock* (2004) 32 Cal.4th 1153, 1171.) "'"A court abuses its discretion when its ruling 'falls outside the bounds of reason.' [Citation.]" [Citation.]' [Citations.]" (*People v. Thomas* (2011) 52 Cal.4th 336, 354-355, fn. omitted.)

In this case, unlike in 2007, defendant did not make any statements demonstrating conscious disregard. Accordingly, his statements in 2007 were significantly probative evidence of his mental state. Defendant argues that "the jury would likely have a very emotional reaction and be inclined to convict appellant simply because it did not like his behavior or attitude during the prior arrest." Any such reaction, however, would be a response to the defendant's conscious disregard, which is precisely what the evidence was relevant and probative to show. For purposes of Evidence Code section 352, "'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that '"uniquely tends to evoke an emotional bias against defendant"' without regard to its

relevance on material issues. [Citations.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

The jury was told that defendant had pleaded guilty to the 2007 offense. "[T]he prejudicial impact of the evidence is reduced if the uncharged offenses resulted in actual *convictions* and a prison term, ensuring that the jury would not be tempted to convict the defendant simply to punish him for the other offenses, and that the jury's attention would not be diverted by having to make a separate determination whether defendant committed the other offenses. [Citation.]" (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

Finally, defendant argues that the prejudice could have been reduced by giving a limiting instruction (e.g., CALCRIM No. 375), but the trial court did not do so. At the point in mid-trial when the trial court admitted the evidence, however, defendant was entitled to a limiting instruction, on request. (See Evid. Code, § 355.) He never requested one, so the trial court never gave one. Presumably, defense counsel decided that defendant was better off without one, because it would have highlighted the significance of this evidence. This after-the-fact strategic decision does not show that the trial court abused its discretion when it ruled.

IV

PROSECUTORIAL ERROR IN CLOSING ARGUMENT

Defendant contends that there were two instances of prosecutorial misconduct during closing argument.

A. *General Legal Principles.*

"A prosecutor's conduct violates the federal Constitution when it infects the trial with such unfairness as to make the resulting conviction a denial of due process. Conduct by a prosecutor that does not rise to this level nevertheless violates California law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citations.]" (*People v. Whalen* (2013) 56 Cal.4th 1, 52.)

"[T]he term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

"'"[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion — and on the same ground — the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]"' [Citations.]" (*People v. Pearson* (2013) 56 Cal.4th 393, 426.)

B. *Shifting the Burden of Proof.*

1. *Additional factual and procedural background.*

During closing argument, the prosecutor said:

"Him drinking, him being double the limit, him being on hydrocodone, the swerving he was doing before — all that had nothing to do with it. It was the tire, and that's what they're saying. And that is ultimately what their defense was — is. It's the blowout. And I suggest to you that that's really the sum and substance of what their defense is. He's not responsible because the tire blew out.

"Well, who says? Really, who says? Because in order for you to accept that as a defense on the issue of causation, you have to do one thing. You have to do one thing, and I suggest to you it's going to be very difficult for you. You have to believe him. It really comes down to a matter of trust of him."

Defense counsel objected, "That's inappropriate argument," but the trial court overruled the objection.

The prosecutor then proceeded to argue that defendant was a liar and not to be believed.

2. *Analysis*.

Defendant argues that, by telling the jury that, to accept a blowout as a defense, "[y]ou have to believe him," the prosecutor misstated the law regarding the burden of proof.

Defense counsel preserved the issue by objecting. Admittedly, he did not request an admonition. The trial court, however, overruled his objection, which shows that an admonition would have been futile. Hence, this requirement is excused. (*People v. Chatman* (2006) 38 Cal.4th 344, 380.)

"When a claim of misconduct is based on the prosecutor's comments before the jury, '"the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."' [Citation.]" (*People v. Williams* (2013) 56 Cal.4th 630, 671.)

Here, the prosecutor's point was that (1) defendant's position on causation turned on whether the tire did, in fact, blow out, and (2) defendant's testimony that the tire blew out was not credible. Admittedly, to acquit on this ground, the jury did not have to believe that the tire did blow out; it merely had to have a *reasonable doubt* that the tire did *not* blow out. Still, that required finding defendant's testimony on this point sufficiently credible to raise such a doubt.[3] Thus, it was legitimate to argue that defendant lacked credibility.

The trial court duly instructed the jury that it had to find defendant guilty beyond a reasonable doubt. (CALCRIM No. 220.) Under these circumstances, it is not reasonably probable that any member of the jury understood the prosecutor to mean that defendant had the burden of proving his innocence.

Separately and alternatively — but for similar reasons — even assuming the jury could have understood the prosecutor to mean that defendant had some burden of proof, there is no reasonable probability that this aspect of prosecutor's argument affected the

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[3] This is true regardless of whether there was other evidence that the tire blew out. Any reasonable doubt about causation had to be based on defendant's own testimony, as corroborated by any such evidence. It would be tantamount to believing that defendant at least *might* be telling the truth.

outcome. Thus, there was no federal constitutional error, and the asserted state law error was harmless. (See *People v. Pearson*, *supra*, 56 Cal.4th at pp. 434-435.)

C. *Misstating Facts.*

1. *Additional factual and procedural background.*

In the prosecutor's rebuttal argument, there was this exchange:

"[THE PROSECUTOR:] Counsel is telling you that it's the pipe's fault, but I'm asking you what did the pipe do? It was just there for obviously years off the side of the road.

"[DEFENSE COUNSEL]: Objection. Lack of foundation and facts not in evidence how long it's been there.

"[THE PROSECUTOR]: I thought there was a stipulation of five years.

"THE COURT: Overruled.

"[THE PROSECUTOR]: Well, again, I remember things. Hopefully I remember correctly. I understood there was a stipulation that the pipe had been there for five years I thought. So it was just there. It wasn't in the middle of the road, so what did the pipe do to cause any of this?"

2. *Analysis.*

"A prosecutor engages in misconduct by misstating facts or referring to facts not in evidence . . . . [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 95.) As defendant notes, there was no stipulation — nor was there any other evidence — that the

pipe had been there for "years." Accordingly, the prosecutor's statement technically constituted misconduct.

The misconduct, however, was not prejudicial, for two reasons. First, how long the pipe had been there was irrelevant. There was no evidence that defendant knew or should have known that the pipe was there. And that is not what the prosecutor was arguing. Rather, he was arguing that the pipe could not have caused the accident all by itself; saying it had been there for years was simply a way of saying that pipes do not jump out at cars and willfully cause accidents. This was true regardless of how long it had actually been there.

Second, the jury would not have blindly accepted the prosecutor's statement. After defense counsel objected, the prosecutor implicitly conceded that he might be misremembering, when he said, "Hopefully I remember correctly." The trial court instructed the jury, "You must decide what the facts are in this case. [You] must use only the evidence that was presented in this courtroom. . . . [¶] Nothing that the attorneys say is evidence." (CALCRIM No. 222.)

In addition, right before closing arguments, the trial court commented, "You're the final arbitrator in this. You're the one who finally makes the decision as to . . . what facts have been proven, and . . . if the attorneys say something that you find was not proven, you're to disregard it. I'm sure it's not done by them on purpose. Sometimes attorneys make mistakes about what they remember . . . was said during the trial."

"We assume the jury followed these instructions, and that any prejudice . . . was thus avoided. [Citation.]" (*People v. Chatman, supra,* 38 Cal.4th at p. 405.)

Thus, once again, we conclude that there was no federal constitutional error, and the asserted state law error was harmless.

V

MISCELLANEOUS SENTENCING PROVISIONS

Defendant challenges sentencing provisions: (1) declaring the truck a nuisance and ordering it sold, (2) designating defendant a habitual traffic offender, and (3) prohibiting defendant from obtaining a restricted license unless he installed an ignition interlock device.

A. *Provision for the Sale of the Truck.*

In a prosecution for specified offenses, including gross vehicular manslaughter while intoxicated, "the court . . . may declare the motor vehicle driven by the defendant to be a nuisance *if the defendant is the registered owner of the vehicle* . . . ." (Veh. Code, § 23596, subd. (a)(1), italics added.) Thereafter, "upon the conviction of the defendant . . . , the court . . . shall order a vehicle declared to be a nuisance . . . to be sold." (*Id.*, subd. (b).)

Here, the trial court declared the truck a nuisance and ordered it sold. The evidence at trial, however, showed that the truck belonged to Sisson, not to defendant. Thus, as the People concede, the truck was not subject to sale under Vehicle Code section 23596.

On our own motion, we questioned whether defendant has standing to challenge this order. After all, if the truck does not belong to him, then he is not aggrieved by its sale. (See Pen. Code, § 1258 [appellate court must disregard errors "which do not affect the substantial rights of the parties"].)

Sisson, however, is not a party to this criminal action. Moreover, Vehicle Code section 23596 does not appear to allow any registered owner other than the defendant to object to the sale (Cf. Pen. Code, §§ 186.5, subd. (a) [providing for third party claims in organized crime forfeiture proceedings], 502.01, subd. (c) [providing for third party claims in computer crime forfeiture proceedings]); it merely allows a third party to receive the proceeds — after deducting the costs of sale and any security interests — "to the extent of his or her provable interest." (Veh. Code, § 23596, subd. (e)(4).) If defendant cannot challenge the order, no matter how patently erroneous, it is unclear how it can be challenged at all.

In a related context, this court has held that the People have standing to represent a crime victim's interest in restitution. (*People v. Green* (2004) 125 Cal.App.4th 360, 378 [Fourth Dist., Div. Two].) In *People v. Barksdale* (1972) 8 Cal.3d 320, the California Supreme Court held that a physician prosecuted for criminal abortion "has standing to assert his patient's rights where they may not otherwise be established. [Citations.]" (*Id.* at p. 333.) Here, for similar reasons, we conclude that defendant has standing to assert Sisson's interest in the truck.

There is no indication in the record that the truck has already been sold or that the issue has otherwise become moot. Accordingly, we will strike the challenged order.

B. *Habitual Traffic Offender Provision.*

Under a series of related statutes, a person convicted of a violation of either driving while intoxicated (Veh. Code, § 23152) or driving while intoxicated and causing injury (Veh. Code, § 23153) who has a certain number of drunk-driving-related prior convictions within a specified period can be declared a habitual traffic offender. (Veh. Code, §§ 23550, subd. (b), 23546, subd. (b), 23550.5, subd. (d), 23566, subd. (d).)

Here, the trial court declared defendant a habitual traffic offender under Vehicle Code section 23550, subdivision (b). Vehicle Code section 23550 applies when "a person is convicted of a violation of Section 23152" and has three or more prior specified drunk-driving-related convictions committed within the previous 10 years. (Veh. Code, § 23550, subd. (a).) Vehicle Code section 23550, subdivision (a) subjects the person to enhanced penalties. Vehicle Code section 23550, subdivision (b) then requires that the person be declared a habitual traffic offender for three years.

Defendant, however, was not convicted of violating Vehicle Code section 23152. Rather, he was convicted of gross vehicular manslaughter while intoxicated, in violation of Penal Code section 191.5, subdivision (a). Defendant therefore argues that Vehicle Code section 23550 does not apply to him.

The People argue that driving while intoxicated (Veh. Code, § 23152) is a lesser included offense of gross vehicular manslaughter (Pen. Code, § 191.5, subd. (a)). (See

People v. Miranda (1994) 21 Cal.App.4th 1464, 1466-1468.) We may assume, without deciding, that the People are correct. If so, we are presented with an issue of statutory interpretation: By referring to Vehicle Code section 23152, did the Legislature mean *only* Vehicle Code section 23152, or did it mean *any* offense that includes all of the *elements* of Vehicle Code section 23152?

We find it determinative that, as mentioned earlier, Vehicle Code section 23550 also specifies enhanced penalties for the new violation of Vehicle Code section 23152. Thus, it would be absurd to construe Vehicle Code section 23550 as applying to a violation of Penal Code section 191.5, subdivision (a), which prescribes its own distinct penalties. (Pen. Code, § 191.5, subd. (c)(1).)

The People do not contend that the trial court could have declared defendant a habitual traffic offender under any statute other than Vehicle Code section 23550, subdivision (b). We deem any such contention forfeited.

We therefore conclude that the trial court erred by declaring defendant a habitual traffic offender.

C. *Ignition Interlock Provision.*

Under Vehicle Code section 23575, subdivision (f)(1), a person who is convicted of certain specified offenses, including a violation of Vehicle Code section 23152 or 23153, and who has certain drunk-driving-related prior convictions can apply for a restricted license that requires him or her to use an ignition interlock device.

Here, the trial court declared that "[P]ursuant to Vehicle Code Section 23575([f])(1)[, i]f an application is made for [a] restricted driver's license, the defendant is prohibited from operating any motor vehicle unless [the] vehicle[is] equipped with an Ignition Interlock Device . . . ." Once again, defendant argues that he was not convicted under Vehicle Code section 23152 or 23153 and thus is not subject to this requirement. And, once again, the People argue that a violation of Vehicle Code section 23512 is a lesser included offense of Penal Code section 191.5, subdivision (a).

Both parties, however, seem to be missing a significant point. Vehicle Code section 23575 subdivision (f)(1) does not impose a license restriction. To the contrary, it *allows* a person to obtain a restricted license who otherwise could not obtain a license *at all*. Ordinarily, when a person is convicted under Vehicle Code section 23152 or 23153, his or her license must be revoked or suspended. (Veh. Code, § 13352, subd. (a).) The duration of the revocation or suspension is from six months to five years, depending on whether the person has certain drunk-driving related prior convictions, and if so, how many. (*Ibid*.) However, the person may be able to obtain a restricted license, subject to various conditions. If the person has particular drunk-driving-related prior convictions, these conditions must include the installation of an ignition interlock device. (Veh. Code, § 13352, subd. (a)(3), (4), (5), (6), (7).)

By contrast, if a person is convicted under Penal Code section 191.5, subdivision (a), his or her license must be revoked for three years. (Veh. Code, § 13351, subds. (a)(1), (3), (b).) There is no similar provision for the issuance of a restricted license. To

construe a conviction under Penal Code section 191.5, subdivision (a) as a conviction under Vehicle Code section 23152 (or 23153) for purposes of the issuance of a restricted license would upset this measured statutory scheme.

Accordingly, we agree that the trial court erred. Defendant is not entitled to a restricted license at all. A fortiori, he is not required to install an ignition interlock device as a condition of obtaining a restricted license.

VI

DISPOSITION

The judgment is modified by striking the provisions declaring the truck a nuisance and ordering it sold, designating defendant a habitual traffic offender, and requiring defendant to use an ignition interlock device as a condition of obtaining a restricted license. The clerk of the superior court is directed to prepare an amended sentencing minute order omitting these provisions. The judgment as thus modified is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.